

EV 05-0221-C Y/H Boatman v Astrue
Judge Richard L. Young

Signed on 04/30/07

NOT INTENDED FOR PUBLICATION IN PRINT

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
EVANSVILLE DIVISION

GARY BOATMAN,)	
)	
Plaintiff,)	
vs.)	NO. 3:05-cv-00221-RLY-WGH
)	
JO ANNE B.)	
BARNHART, COMMISSIONER OF THE)	
SOCIAL SECURITY ADMINISTRATION,)	
)	
Defendant.)	

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
EVANSVILLE DIVISION

GARY BOATMAN, substituted for)	
MARIEANNA BOATMAN, Deceased)	
(Social Security No. XXX-XX-4197),)	
)	
Plaintiff,)	
)	
v.)	3:05-cv-221-RLY-WGH
)	
MICHAEL J. ASTRUE,)	
COMMISSIONER OF SOCIAL)	
SECURITY, ¹)	
)	
Defendant.)	

**ORDER ON PLAINTIFFS EAJA MOTION
FOR AWARD OF ATTORNEY FEES**

On March 8, 2007, Plaintiff filed a Motion for Award of Attorney Fees pursuant to the Equal Access to Justice Act, 28 U.S.C. § 2412(d) (“EAJA”). Defendant filed a Memorandum in Opposition on March 23, 2007.

A plaintiff is entitled to receive attorney’s fees pursuant to the EAJA if the plaintiff is a prevailing party whose net worth does not exceed two million dollars and if the position of the United States in this litigation was not substantially justified. In this case, the Plaintiff received a decision of this court remanding the case for further proceedings, and the court will assume that the Plaintiff is therefore a prevailing party.² The Affidavit of Gary Boatman establishes that his net worth does not exceed two million dollars at the time the action was filed, and the United States, likewise, does not

¹On February 12, 2007, Michael J. Astrue became the Commissioner of Social Security. Pursuant to Rule 25(d) of the Federal Rules of Civil Procedure, Michael J. Astrue, in his official capacity only, is **SUBSTITUTED** as the Defendant in this action.

²The United States does not argue that the order of remand does not allow the Plaintiff to be considered a prevailing party.

challenge that assertion. Therefore, the issue before the court is whether the position of the United States in this litigation was substantially justified. In *Pierce v. Underwood*, 487 U.S. 552, 108 S.Ct. 2541, 101 L.Ed.2d 490 (1988), the United States Supreme Court held that the government's position is substantially justified if it is "justified to a degree that could satisfy a reasonable person" and "if it has a reasonable basis in law and fact." *Id.* at 565-66. More recently, the Seventh Circuit in *Kolman v. Shalala*, 39 F.3d 173 (7th Cir. 1994), has stated the test becomes "whether the agency had a rational ground for thinking it had a rational ground for its action." *Id.* at 177. The court must assess the government's position both during litigation and its position during the administrative proceeding. 28 U.S.C. § 2412(d)(2)(D).

This claim involves a person who was 50 years old at the time she alleged she became disabled from impairments including chronic obstructive pulmonary disease, osteoarthritis, mild obesity and depressive disorder N.O.S. (R. 27). The Plaintiff had a limited education, a semi-skilled work background, and no transferrable skills. The Administrative Law Judge ("ALJ") had concluded that she was able to perform a limited range of light work.

In this court's order remanding the case, it discussed three issues raised by the Plaintiff in the appeal of the ALJ's decision. The court found that the ALJ's findings concerning the Plaintiff's breathing impairment were supported by substantial evidence and were proper. The court also found that the ALJ's determination concerning the Plaintiff's mental impairments were proper.

The sole basis for remand in this case was the ALJ's failure to have as complete and thorough a hypothetical question directed to the vocational expert as was necessary under this circumstance. There is conflicting testimony as to whether the Plaintiff's "stiffness in her hands" is a severe condition. For example, there is some evidence (R. 164) that her ability to perform manipulation was normal and that she had normal grip strength. The ALJ simply omitted from the vocational expert's hypothetical question whether the Plaintiff's ability to perform "fine finger manipulation" might have

impacted the vocational expert's analysis of her ability to perform other jobs in the national economy.

At this time, prior to obtaining the results from any remanded decision, this court is unable to determine whether the inclusion of the fine finger manipulation limitation would have changed the answer to the hypothetical question given to the vocational expert. There is certainly some possibility that even based upon a proper hypothetical question, the Plaintiff will be able to perform a substantial number of the packer, inspector and miscellaneous assembler jobs described by the vocational expert.

This court, therefore, concludes that the United States' position in this litigation was well grounded in fact and law and was substantially justified. Therefore, the Plaintiff is not entitled to fees under the EAJA, and the motion (Docket # 23) is **DENIED**.

SO ORDERED.

Entered: April 30, 2007.

s/ Richard L. Young

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